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No. 922

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

HARRY J. STADIN,
Petitioner,

v.

UNION ELECTRIC COMPANY,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	4
Statement	4
Reasons for granting the writ	18
Conclusion	25
Signature	25

CITATIONS.

Cases:

Atlantic City Electric Co. v. General Electric Co. (SD NY 1962) 207 F Supp 613 23

Clark v Sandusky (CA 7, 1953) 205 F 2d 915 20

Hansberry v Lee (1940) 311 US 32 ..... 2, 18

Independent Refiners Ass'n v Standard Oil Co. (N. J.) Case No. 16,725 (CA DC 1962) 304 F 2d 387 ..... 21, 22, 23

International Mortgage & Investment Corp. v Von Clemm (CA 2, 1962) 301 F 2d 857 ..... 21, 22, 23, 25

Kansas City, Missouri v Federal Pacific Electric Co. (CA 8, 1962) 310 F 2d 271 24

Kozak v Wells (CA 8, 1960) 278 F 2d 104 ..... 20, 21, 22, 25

Philadelphia Electric Co. v Westinghouse Electric Corp. (CA 3, 1962) 308 F 2d 856 24

Rogers v American Can Co. (CA 3, 1962) 305 F 2d 297 ..... 5, 18, 19, 20

Sam Fox Publishing Co. v U. S. (1960) 366 US 683 ..... 2, 17, 18, 20, 22

Stadin v Union Electric Co. (CA 8, 1962) 309 F 2d 912, 362 SW 2d Advance Sheets No. 4, p. XXXVI 9

U. S. v C. M. Lane Lifeboat Co. (ED NY 1938) 25 F Supp 410 ..... 12, 22

Statutes:

Clayton Act, Sec. 4, 38 Stat. 731, 15 U.S.C. 15 ..... 2, 4, 6

Clayton Act, 15 U.S.C. 15b and 16 (b) 16

Sherman Act, Sec. 1, 15 U.S.C. 1 6

28 U.S.C. Sec. 1254 (1) 2

28 U.S.C. Sec. 1292 (b) 5, 16

Revised Statutes of Missouri, 1959, Sec. 351.215 ..... 10, 12

Federal Rules of Civil Procedure, Title 28 U.S.C.

Rule 23 (b) 2, 3, 4, 6, 19, 24

Rule 24 (a)(2) 2, 3, 4, 5, 6, 18, 19, 21, 22, 24, 25

Rule 24 (b)(2) 5

Rule 24 (c) 3, 6, 20

Rule 54 (b) 5

Rule 56 (e) 23

Rule 56 (g) 23

Miscellaneous:

"Antitrust Economics", 20 Am. Bar. Asso. Antitrust Section 19, 25

"Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24 (a)(2)", 50 Cal. L. R. 89 ..... 2, 18

John Herling: "The Great Price Conspiracy" (Robert B. Luce, Inc., 1962) 19, 25

Milton Handler: "Some Unresolved Problems of Antitrust" (1962) 62 CLR 930 24

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner Harry J. Stadin prays that a writ of certiorari issue to review the November 15, 1962 judgment of the aforesaid Court of Appeals entered in this case, No. 17,104 below.

OPINION BELOW

The opinion of the court below is recited in the Court of Appeals record ("R-A") p. 6, and in the separately submitted Appendix ("App.") p. 2. After its rendition it was modified, without order, in accordance with the first six suggested corrections listed in the petition for rehearing, pgs. 23-24, a certified copy and nine other copies of which are filed with this court. As so modified it is reported in **309 F 2d 912.**

JURISDICTION

The judgment of the court below was dated and entered November 15, 1962 (R-A 26, App. 22). A timely petition for rehearing filed December 5, 1962 (R-A 2) was denied December 26, 1962 (R-A 27). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

I

Whether, as indicated in **50 Cal. L. R. 89, 91,** this court's decision in **Sam Fox Publishing Co. v U. S. (1960) 366 US 683, 694,** when coupled with its decision in **Hansberry v Lee (1940) 311 US 32, 42,** makes Rule 24 (a)(2)[1] a nullity where derivative intervention under Rule 23 (b) is sought by a stockholder in a private suit brought by his company for triple-damages under Section 4 of the Clayton Act.

II

Whether a minority common stockholder of a utility company may intervene derivatively under Rule 23 (b) in a triple-damage Clayton Act action brought by his company against certain convicted price-fixing corporations respecting price-fixed goods of one category they allegedly sold it, where the stockholder seeks intervention under Rule 24 (a)(2) in order to assert on behalf of his company additional claims against said price-fixing corporations respecting price-fixed goods of eleven other categories they allegedly sold it, when those eleven additional claims are not asserted by his company in the

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[1] All Rules referred to herein are those of the Federal Rules of Civil Procedure, Title 28 U.S.C.

main action, or in any other action, and where bad faith condonation is alleged and common questions of law and of fact have been found to exist.

III

Whether such a stockholder may so intervene in such Clayton Act action brought by his company against such incorporated price-fixers, where he seeks under Rule 24 (a)(2) to intervene derivatively under Rule 23 (b) so as to be able to bring in as additional defendants in that main action certain officers of those convicted price-fixing corporations who were themselves similarly convicted, but who were not made parties defendant by his company in its main action, bad faith condonation being alleged and common questions of law and of fact having been found to exist?

IV

Whether affidavits offered by a corporate plaintiff in the main action in support of that plaintiff's objection to a motion of one of its stockholders to intervene derivatively as an additional party plaintiff in the main action should be taken as true, or whether, absent sham or frivolity, the allegations made in movant's sworn pleadings should be taken as true, or whether, a hearing being held, neither the plaintiff's affidavits nor the movant's sworn pleadings can be taken as true, but instead only the evidence adduced at the hearing can be taken as the basis of a judgment on said motion.

V

Whether a motion filed under Rule 24 (a)(2) to intervene derivatively under Rule 23 (b), which was accompanied by a verified complaint filed under Rule 24 (c) and which was tried in the District Court on the basis of the record and testimony given at a hearing, may be re-tried

in the Court of Appeals, sua sponte, on the additional basis of an additional affidavit filed subsequent to that hearing in the District Court by an opponent to that motion, the District Court having granted that opponent leave to file, not an additional affidavit, but only an additional brief.

VI

Whether a transcript of proceedings had at a stockholders' meeting which is incorporated into an affidavit of the company's counsel filed in opposition to a stockholder's motion under Rule 24 (a)(2) to intervene derivatively under Rule 23 (b), but which transcript is not sworn to by said affiant or anyone else as containing a true recital of those proceedings, and which is objected to in the District Court by movant on the ground of hearsay, may be given any probative value by a Court of Appeals in passing on that District Court's denial of that motion to intervene.

STATUTE INVOLVED

The statute involved is Sec. 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C., 15. It is recited in App. 1.

STATEMENT

Basically, this case involves the right of a minority stockholder to intervene derivatively in a Clayton Act action brought by his company against convicted price-fixers, in order to bring in, over the objection of his company but not of the defendants, additional claims and additional parties defendant. That right has not been passed on by this court, nor by any court other than the court below. It poses an important sociological question, as well as a legal question. See petition for rehearing, "The Sociological Effect of this Court's Decision", pgs. 19-23.

The appeal below involved petitioner's motions to intervene in two cases. On May 17, 1962 the District Court denied petitioner's motion in the first case, but expressed the opinion under 28 U.S.C. 1292 (b) that its order "involves a controlling question of law upon which there is substantial ground for difference of opinion", and that immediate appeal was desirable. See District Court record ("R") 120, App. 23. On June 11, 1962 the court below denied petitioner's application for leave to appeal immediately under 28 U.S.C. 1292 (b), but did so without prejudice. (R-A 1).

Thereupon, on June 14, 1962, the day before the decision was rendered in **Rogers v American Can Co. (CA 3, June 15, 1962) 305 F 2d 297**, the case which the court below stated petitioner "presses upon us", contending that it "governs the present appeal" (R-A 23, 12, App. 19, 8), the District Court denied petitioner's motion to intervene in the second case. However, it entered final judgment against him in that case so that he might immediately appeal (R 121, App. 24). In that final judgment, entered under Rule 54 (b), the District Court consolidated the two cases for purpose of appeal.

On June 15, 1962 petitioner filed his notice of appeal in the two consolidated cases (R 123). The appeal was heard on both, and in both the District Court's denials of petitioner's motions to intervene were affirmed insofar as they pertained to intervention under Rule 24 (a)(2). Insofar as they concerned intervention under Rule 24 (b)(2) the appeals in both were dismissed (R-A 25, App. 21).

This petition involves only the review of the judgment of the court below in the first case, and only insofar as that judgment (R-A 26, App. 22) affirmed the District Court's denial of petitioner's motion to intervene under Rule 24 (a)(2).

On July 16, 1962 the court below granted petitioner leave to have his appeal heard on the original District Court record, without need to print (R-A 2, item 9). That original District Court record has been filed with this court as Vol. I of the record, along with a certified copy of the pertinent portions of the record of the court below, Vol. II.

The combined record herein shows (R 1, 137) that on December 26, 1961 Union Electric Co. ("Union"), the plaintiff in the main case and appellee below, brought an action in the U. S. District Court in St. Louis against Westinghouse Electric Corp. and General Electric Co., seeking triple-damages against those two corporations under Sec. 4 of the Clayton Act, 15 U.S.C. 15. The jurisdiction of the District Court was invoked under that section of that Act. Union claimed that said corporations had violated Sec. 1 of the Sherman Act, 15 U.S.C. 1, and that it had been injured by the unlawful overcharges they made in their sales to it of electrical equipment of one category, i.e. turbine-generators.

In its complaint Union alleged (R 6) that Westinghouse and General Electric had both pleaded guilty of conspiratorial price-fixing in their sales of turbine-generators to it, and that they, along with W. S. Ginn, C. J. Mauntel, W. C. Rowland and W. E. Saupe, who (R 2) "participated in the combination and conspiracy" to "fix" the price of said turbine-generators (R 3), were convicted in February, 1961 in criminal antitrust proceedings instituted against them by the federal government (R 6).

On February 20, 1962, before the main case was at issue, petitioner filed his motion to intervene derivatively as a party plaintiff therein, under Rule 23 (b). He sought intervention under Rule 24 (a)(2), and attached to his motion his verified complaint (R 20), filed in compliance with Rule 24 (c). In that complaint he incorporated by

reference all the allegations made by Union in its complaint (R 21).

Petitioner alleged (R 20) that he was a common stockholder of Union, and that as such he had an economic interest in the outcome of the main action. He made (R 20) all the formal allegations required by Rule 23 (b) and specifically alleged (R 24) that Union's directors had refused to cause it to enforce rights which might properly be asserted by it. He alleged with particularity (R 20-21) the efforts he had made to secure from Union's directors and stockholders the action he desired they take, and the reasons for his failure to obtain such action from them. He specifically alleged (R 21) that at Union's April 20, 1961 stockholders' meeting certain stockholders and certain members of Union's board "spoke out against" the adoption of a stockholder resolution he there presented, which called on the directors to cause Union to pursue "all its legal rights" against "any of those of its electrical equipment suppliers who were recently convicted", and that "all" the members of Union's board voted against his resolution, which was defeated.

In his motion (R 19) petitioner alleged that representation of his interest by Union "is or may be inadequate"; that he "is or may be bound by a judgment in the main action"; and that his claims and Union's "have a question of law and fact in common". He pleaded those same allegations in his complaint (R 25). As to his allegations of common questions, on April 20, 1962 the District Court found, as recited in its May 8, 1962 pre-trial conference order (R 113), that his proposed action and Union's main action "involve common questions of law and of fact" (R 117). See also its order of June 14, 1962 (R 121, App. 24).

In his complaint (R 22) petitioner alleged that apart from their sales to Union of price-fixed turbine-generators, which sales formed the basis of Union's claims against

defendants in the main action, and apart from their sales to it of seven additional categories of price-fixed equipment, which sales formed the basis of seven additional claims which Union thereafter, on January 31, 1962 (R. 10, 142), filed against them in said District Court, defendants sold Union price-fixed equipment embracing eleven other named categories, respecting which they had also been convicted.

Petitioner then alleged (R 22) that "Union did not bring suit" respecting any of those eleven additional categories of equipment, and (R 21) that as to those categories its directors and majority stockholders "adopted the policy of condonement of the aforesaid price-fixing". He alleged (R 21) that he then advised Union's president, J. W. McAfee, on April 24, 1961, that "unless the company changed its policy, and undertook to pursue its legal rights against said price-fixers", petitioner himself would "seek legal remedy on behalf of the company . . . in a derivative stockholder action or actions". To date Union has not brought any Clayton Act actions respecting any of said eleven additional categories of equipment. Nor has it brought any such action against W. S. Ginn or C. L. Mauntel or W. C. Rowland or W. E. Sampe.

On February 26, 1962 the District Court granted Union leave to file a "brief and documentary evidence" in opposition to petitioner's motion to intervene (R 137). On March 28, 1962 it filed such brief, to which it attached three affidavits (R 61, 66 and 71). On April 5, 1962 (R 137) petitioner filed his answering brief, together with his answering affidavit (R 94-99). His motion was heard on April 6, 1962 (R 137). Petitioner testified that the allegations contained in his verified complaint and in his answering affidavit were true (R 127). He was not cross-examined and no other testimony was offered (R 127). Union then requested and was granted 5 days in which to

submit an additional brief (R 137, App. 26). Petitioner was granted 5 days in which to reply (R 137, App. 26).

Instead of filing an additional brief, on April 10, 1962 (R 137, App. 26) Union filed an additional affidavit (R 103, App. 26), though insofar as the introduction of evidence was concerned petitioner's motion had been "heard, argued & submitted" at the close of the April 6, 1962 hearing (R 137, App. 26). The affidavit was that of John A. Woodbridge, Union's chief counsel in the main action (R 18). To it was attached its Exhibit A (R 104-111), which consisted of alleged "complete and accurate excerpts from the transcript of the Annual Meeting of Stockholders of Union Electric Company held on April 20, 1961". The transcript from which Exhibit A was taken was not otherwise identified, nor did the affidavit recite that the transcript from which the "excerpts" were taken truly recited what was said at the meeting. Instead, it simply said that the "excerpts" comprising Exhibit A "are hereby made a part of this affidavit as though fully set out herein" (R 103, App. 26).

On April 16, 1962 (R 138) petitioner filed his sworn objection to that affidavit, on the ground of hearsay (R 112). He stated that it incorporated "recitals purporting to have been uttered on April 20, 1961 by J. W. McAfee, Jens O. Larsen and Thomas J. Connelly" which were not "sworn to by them" as having been uttered. The District Court did not pass on that evidentiary question. The evidence had already been taken as submitted, as aforesaid (R 137, App. 26).

The basis of the judgment of the court below is succinctly stated in the "Synopsis of Recent Federal Cases" published in the January 22, 1963 South Western Reporter Second Series Advance Sheets, **362 SW 2d No. 4, p. XXXVI**, wherein it is stated that the court below

"held that minority stockholder was not entitled to intervention as a matter of right on the basis of possible inadequacy of representation where there was a showing merely of difference of opinion between shareholder and plaintiff as to how litigation should be conducted, and where there was no showing of failure of plaintiff in fulfillment of its duty to its shareholders".

That was the showing made by Union's affidavits, which the court below took as true. But those affidavits controverted petitioner's motion and verified complaint and answering affidavit, and all the testimony that was offered at the hearing, in the following respects:

a. Petitioner's complaint alleges (R 24) that Union's directors "refused to cause the company" to sue on the eleven categories of equipment; that they "expressed their intention not to cause the company to do so"; that they "condoned the sale of such equipment items to Union at price-fixed prices"; and that Union "did not bring suit thereon" (R 22), though it sustained damages "running into the millions of dollars" (R 23). In its first affidavit Union's executive vice-president A. H. Schettler stated (R 63) that "The management of Union Electric has not refused to bring suit", but rather was "investigating" the matter. Over a year had passed since petitioner first requested that suit be brought (R 20).

b. Petitioner's complaint alleges (R 23) that on February 9, 1962 Union refused to divulge to petitioner, "or permit him to ascertain from examination of its books and records, contrary to R. S. Mo. 1959, Sec. 351.215, the amounts it expended during the conspiracy period" in purchasing the aforesaid eleven categories of equipment, and that on that date it "refused to divulge to intervenor the names of the various suppliers from whom it purchased said equipment items". In his affidavit Mr.

Schettler stated (R 63) that Union "has never refused to permit movant to examine its records of purchases" and (R 64) that it had "advised" petitioner on several occasions that its "original records" were "available" to him. He did not say when those alleged advices were given. In his affidavit of April 5, 1962 petitioner alleged (R 98) that they were given after his motion to intervene was served and filed on February 20, 1962.

c. Petitioner's complaint alleges (R 21) that "all" of the members of Union's board, of which Mr. Woodbridge was one, voted against his resolution, and that Mr. Woodbridge "voted against bringing such suit". It further alleges (R 23) that Mr. Woodbridge "voted against bringing the main action". In his first affidavit Mr. Woodbridge stated (R 69) that though he "voted against" petitioner's resolution "for the reason that it was not a proper subject for action by stockholders", since "under Missouri law . . . the decision whether or not to litigate is in the directors" (R 67), "he never voted against bringing such actions" (R 69).

d. By incorporating into his verified complaint, by reference (R 21), "all" of the allegations made by Union in its complaint, petitioner alleged, as did Union (R 2), that "W. S. Ginn, C. I. Mauntel, W. C. Rowland and W. E. Sampe participated in the combination and conspiracy hereafter alleged", i.e. the turbine-generator combination and conspiracy. They were expressly not named by Union "as defendants", but were named as "co-conspirators" (R 2) who had continuously agreed to "fix" the prices of the turbine-generators sold to Union (R 3), for which acts they were indicted and sentenced (R 6). Thus petitioner alleged that Union did not make them parties defendant in its main action. It refused to. As petitioner alleged (R 24), Union's directors refused to cause the company to "bring any such suits, against defendants or any oth-

ers", and (R 25) that "such condonation and refusal on the part of Union's directors was not done in good faith, amounted to an unreasonable, capricious and arbitrary exercise of business judgment, and constituted a breach of trust on the part of said directors". That last allegation covered the directors' refusal to sue on the eleven additional categories as well. Petitioner alleged that they "condoned the sale of such equipment items to Union at price-fixed prices" (R 24).

The court below found those allegations of "condonation and bad faith" to be "only the pleader's conclusions" (R-A 17, App. 13). It relied on Mr. Schettler's affidavit, in which he alleged (R 64) that Union's management "is in no way connected with the defendants in these causes of action or with any other electrical equipment suppliers named in the indictments"; that Union is "not in collusion with any of the defendants or the other electrical equipment suppliers concerning any decision whether or not to bring suit against them"; and (R 61) that "It is not now, nor has it ever been, the policy of Union Electric to condone any price-fixing by electrical equipment suppliers".

e. Petitioner alleged in his motion (R 19), and in his complaint (R 25), that his representation by Union "is or may be inadequate". He alleged (R 25) that Mr. Woodbridge, "Union's principal attorney in the main action", was "not on friendly terms" with petitioner, having denied him the corporate record inspection privilege accorded all stockholders by R. S. Mo. 1959, Sec. 351.215, as aforesaid, and having characterized certain short-swing profit charges petitioner brought against him, in proceedings before the SEC, as being "malicious". In his affidavit of April 5, 1962 (R 98) petitioner alleged the converse of that "not on friendly terms" allegation, i.e. that "I am not on friendly terms with Mr. Woodbridge", and that under **U. S. v C. M. Lane Lifeboat Co. (ED NY 1938) 25 F Supp**

410, 411, "My feeling about him, not his about me, is what counts". Petitioner made that converse allegation because Mr. Woodbridge had (R 68) denied that he was "on unfriendly terms" with petitioner, and alleged that he "has never stated that movant in these cases, Harry J. Stadin, had made malicious charges".

f. In his affidavit of April 5, 1962 petitioner alleged (R 98) that "Mr. Woodbridge's personal interests are contrary to mine. He cannot adequately represent me". Petitioner stated those divergencies of personal interest. Apart from the aforesaid charges he alleged (R 96) he had made before the SEC respecting Mr. Woodbridge's "unlawful short-swing arbitrage profits", which charges petitioner alleged Mr. Woodbridge had characterized to the SEC as "malicious" (R 25), petitioner alleged (R 96) the part Mr. Woodbridge had played before the SEC, over petitioner's opposition, respecting the exemption of Union from the Holding Company Act, and (R 97) the part he had played before the SEC, over petitioner's opposition, respecting the issuance to himself of options to buy 962 shares of Union's common stock at a discount. The court below treated those allegations as though immaterial, and on the basis of Mr. Woodbridge's affidavit (R 67) found that petitioner had made no showing of the possible inadequacy of Mr. Woodbridge's representation of his interests in the main action (R-A 18, App. 14).

g. In his April 5, 1962 affidavit petitioner alleged (R 94-95) that at Union's April 20, 1961 stockholders' meeting stockholder Jens O. Larsen stated that bringing suit against the equipment suppliers might amount to "wasting quarters to recover nickles"; that stockholder Thomas J. Connelly stated that bringing suit against them would be "just money thrown away", since "none" of them "made any exorbitant profits"; and that

> "Mr. J. W. McAfee, a director and president of Union, concurred in those statements. He said that

suits for triple damages might cut into research and development programs of those suppliers to an extent that would be 'detrimental' to the industry of which Union was a member".

Instead of cross-examining petitioner, who at the hearing (R 127) testified to the truth of that allegation, or instead of offering contradictory testimony thereat, or a sworn transcript of the proceedings at the April 20, 1961 stockholders' meeting, Mr. Woodbridge, four days thereafter (R 138), filed his additional affidavit of April 10, 1962 (R 103, App. 26), as aforesaid, incorporating therein his Exhibit A (R 104-111). That Exhibit A, the unsworn "excerpts", shows that instead of concurring with Mr. Larsen, as petitioner had alleged (R 95), Mr. McAfee simply said that he would "bear in mind" Mr. Larsen's injunctive (R 110), and that in his reply to Mr. Connelly all Mr. McAfee said was "Thank you very much" (R 111). Relying on that, the court below found (R-A 24, App. 20) that Mr. McAfee's replies "are only acknowledgments of the shareholders' comments and a statement of appreciation for them".

h. That action of Mr. Woodbridge shows his professional character. Mr. Schettler stated in his affidavit (R 64) that Union was "well satisfied with its legal representation in these law suits". In reply petitioner, a lawyer (R 94), alleged (R 98): "I am not satisfied with Mr. Woodbridge". The court below found (R-A 18, App. 14) that petitioner's dissatisfaction with Mr. Woodbridge "lies largely in the area of asserted disagreement between lawyers as to how litigation should be conducted". Petitioner was not only interested in **how** the litigation should be conducted. He was also interested in **what** litigation should be conducted, as the prayer of his complaint shows (R 26). The court below found that Mr. Woodbridge's actions and non-actions constituted a "mere difference of

opinion among attorneys", and did not constitute "inadequate representation within the meaning of the Rule" (R-A 18, App. 14). Though petitioner suggested in his petition for rehearing, p. 19, that the court below had overlooked the fact that by his attempted subterfuge Mr. Woodbridge had "disqualified himself" from adequately representing petitioner, the court below did not change its ruling.

i. As to petitioner's allegation (R 95) of Mr. McAfee's statement respecting the detriment the filing of triple-damage suits would occasion the industry of which Union was a member, the court below found (R-A 24, App. 20) that Mr. McAfee "named it as a worrisome fact and nothing more". Mr. Woodbridge's Exhibit A, on which the court below relied, quotes Mr. McAfee as having said "It is a very considerable worry" (R 108).

j. In its opinion (R-A 12, App. 8) the court below, referring to Mr. Woodbridge's Exhibit A, stated that in objection thereto petitioner asserted "that the statements made at the meeting were not under oath and were hearsay". The court below misinterpreted petitioner's objection. What petitioner asserted (R 112) was that since Exhibit A was not sworn to as truly reflecting what was said at the meeting, the "recitals" contained therein "are not admissible in this case, being hearsay". That oversight of the court below was called to its attention in petitioner's petition for rehearing, "The Hearsay Point", pgs. 16-19.

k. In his complaint petitioner alleged (R 21) that at the April 20, 1961 meeting of Union's directors and stockholders "all" the directors (which included Mr. McAfee) "adopted the policy of condonement of the aforesaid price fixing", and as regards the eleven categories (R 24) "condoned the sale of such equipment items to Union at price-fixed prices". As hereinbefore stated, petitioner alleged

(R 95) that at that meeting Mr. McAfee stated that for Union to bring triple-damage suits against its suppliers "would be 'detrimental' to the industry of which Union was a member". In contrast, in his affidavit Mr. Schettler stated (R 61) that "It is not now, nor has it ever been, the policy of Union Electric to condone any price-fixing", and (R 64) that "Management does not represent any interest adverse to movant's interest as a stockholder". He did not state that petitioner's interest and the industry's interest were the same. Nor did he state that Union had not condoned. He simply stated that it was not its policy to do so.

1. In furtherance of the interest of Union's management, and that of the industry of which it is a member, Union, led by Mr. Woodbridge, opposed petitioner's application (R-A 1) for leave to appeal under 28 U.S.C. 1292 (b). At the hearing on that application (R-A 1), and in its brief on the merits of petitioner's appeal (R-A 3, 4 and 5), Union contended that petitioner's complaint, though he had sworn to it (R 26) and had testified that it was true (R 127), was "sham". Union opposed petitioner's motion to hear the appeal on the original District Court record, and urged that he be required to print (R-A 2, item 8). It was the only party, below or in the District Court, that opposed petitioner's intervention.

Furthermore, as "adequately" representing petitioner and Union and the industry ever since it filed the main case, Union has been content to let the 4 year statute of limitations provided for in 15 U.S.C. 15b and 16 (b) run against it as regards its turbine-generator claims against W. S. Ginn, C. I. Mauntel, W. C. Rowland and W. E. Saupe, and likewise as regards its claims against Westinghouse and General Electric respecting the eleven other categories of price-fixed equipment that Union admitted in its second and third affidavits those suppliers had sold it (R 62, 73). It is still "investigating" those claims.

m. Petitioner alleged (R 19, 20) that he is and was a common stockholder of Union. With the privity that such relationship establishes in mind, and realizing that the Missouri Public Service Commission, acting on behalf of Union's consumers, might claim all or part of the proceeds of any judgment that Union might receive, he alleged (R 19, 25) that he "is or may be bound by a judgment in the main action". He also alleged (R 20) that his proposed intervening action "constitutes a class intervention", and (R 25) that he sought intervention on behalf of himself and all "similarly situated holders of Union's common stock". He further alleged (R 19, 25) that his claims and Union's claims in the main action "have questions of law and fact in common". He made that allegation because Union's directors are fiduciaries.

Though in his affidavit (R 61) Mr. Schettler admitted that petitioner "owns 47 shares of the common stock" of Union, Union nonetheless contended (R 43) that petitioner would not be bound by a judgment in the main action. The court below, omitting all mention of the class nature of petitioner's intervention, and the fact that Union's directors were fiduciaries, not only found him not inadequately represented in the main action (R-A 16-20, App. 12-16); it also found (R-A 14, App. 10) that he "could be regarded as being satisfied with Union's representation there". Despite that finding it further found that he would not be bound by a judgment therein since the res judicata test applied by this court in **Sam Fox** would not be met (R-A 15-16, App. 11-12).

In contrast to the District Court's finding of common questions of law and of fact (R 117), the court below found (R-A 15, App. 11) that the issues presented by petitioner's claims differed from those presented by Union's in that on the face of petitioner's pleadings "the issues are several in number and are varied as to factual background". Hence the court below held (R-A 15, App. 11):

"This casts doubt on any claim that a judgment in one category will possibly operate with binding effect in another". It found that petitioner, whom it recognized as a common stockholder of Union (R-A 8, App. 4), would not be bound by a judgment in the main action, though adequately represented therein by Union.

REASONS FOR GRANTING THE WRIT

1. In interpreting Rule 24 (a)(2) the court below decided a federal question in a way that is in conflict with applicable decisions of this court. It found that petitioner, a stockholder of the plaintiff in the main action, was adequately represented therein, but would nonetheless not be bound by a judgment therein. In **Sam Fox Publishing Co. v U. S. (1961) 366 US 683, 689,** this court held that the applicant for intervention there was not adequately represented, and hence, l.c. 694, could not be legally bound within the meaning of the Rule. In **Hansberry v Lee (1940) 311 US 32, 42,** it held that a judgment in a class action is legally binding on those adequately represented therein. Hence, unless **Sam Fox** be distinguished in its interpretation of the word "bound" as used in Rule 24 (a)(2), it and **Hansberry**, taken together, render Rule 24 (a)(2) a nullity, at least in class and fiduciary suits. See **50 Cal. L. R. 89, 91.** For there cannot be, as in the instant case, both a holding that the applicant for intervention is adequately represented by his company and that he would not be bound by a judgment in the main case in the res judicata sense.

2. The decision of the court below is in apparent conflict with the decision of the U. S. Court of Appeals for the Third Circuit in **Rogers v American Can Co. (1962) 305 F 2d 297.** Though the court below distinguished **Rogers** on the ground (R-A 24, App. 20) that there "plaintiff's charge was that his corporation was a captive through

conspiratorial activities of its controlling directors", while here petitioner charged "no comparable situation", legally plaintiff's directors here are in the same boat with the conspiring directors in **Rogers**.

Rogers was a class suit (l.c. 298), as is the instant case (R 20, 25). In **Rogers** it was the defendant directors who were the alleged wrongdoers. Here it is the plaintiff's directors who are charged with specified feasance and nonfeasance "not done in good faith" which "amounted to an unreasonable, capricious and arbitrary exercise of business judgment, and constituted a breach of trust" (R 25). Factually, the situation here is not comparable to that in **Rogers**, but legally it is. In view of petitioner's allegations respecting their "policy of condonement" (R 21), *Union is just as much a "captive" of* its directors as Metal & Thermit Corp., the injured company in **Rogers**, was the "captive" of its.

3. Though the court below (R-A 21, App. 17) assumed an affirmative answer thereto for the purpose of passing on the instant case, the procedural question presented here, i.e. whether a derivative secondary action under Rule 23 (b) may properly be instituted through the device of intervention under Rule 24 (a)(2), has not been, but should be, settled by this court. It is an important question of federal law the answer to which is plainly in the public interest, particularly where, as here, the intervention is sought to enable a stockholder of a public utility to bring in individual co-conspirators as additional defendants and likewise recover derivatively from the corporate defendants additional damages based on additional claims brought under Sec. 4 of the Clayton Act. See John Herling, **"The Great Price Conspiracy" (Robert B. Luce, Inc., 1962) pgs. VII, 13, 74, 81, 85, 179, 259, 260, 305, 309 and 319**, and **20 A.B.A. Antitrust Section, pgs. 29, 46, 47, 78 and 93.**

4. On the question of whether, for the purpose of passing on Union's contention in its brief (R 60) that petitioner's motion to intervene should be denied (Union filed no motion to dismiss or motion for summary judgment), the allegations made by petitioner in his verified complaint (R 20) and in his supporting affidavit (R 94) should or should not be taken as true, the decision of the court below is demonstrably in conflict with the decision of this court in **Sam Fox**, supra, l.c. **691**, the decision of the U. S. Court of Appeals for the Seventh Circuit in **Clark v Sandusky (1953) 205 F 2d 915, 918**, and the decision of the U. S. Court of Appeals for the Third Circuit in **Rogers**, supra. Though the pleading there was not a Rule 24 (c) pleading, since intervention was not sought, in **Rogers** Judge Forman held, l.c. **318**, that for the purpose of passing on defendants' motions for summary judgment and to dismiss, the allegations in plaintiff's amended complaint "are to be taken as true". In **Sam Fox** this court held, l.c. **691**, that the record should be taken "at face value".

In the instant case Judge Blackmun did not take the allegations of petitioner's pleadings at face value. Contrary to his statement in **Kozak v Wells (CA 8, 1962) 278 F 2d 104, 109** (wherein a different panel of the court below held that "absent sham and frivolity, we accept the allegations of those pleadings as true") the panel of the court below that decided the instant case actually considered affidavits in opposition that controverted material facts alleged by petitioner, and in addition an affidavit based on hearsay that petitioner had objected to as such (though, speaking through the same Judge Blackmun, it referred to the decision in **Kozak** and stated (R-A 13, App. 9) that it could consider only "well pleaded" affidavits in opposition that supplied "uncontroverted and material facts"). In that respect the panel that decided the instant case did not follow **Kozak**, and did not even follow its own

pronouncement of the law in this case. Though it said it was not engaging in "trial by affidavit", that is exactly what it did.

5. Whether to take as true the pleadings of an applicant for intervention, where that applicant seeks to intervene as a party plaintiff and is opposed by the plaintiff in the main action, or to take that plaintiff's opposing affidavits as true, involves, as the District Court expressed it (R 120, App. 23), "a controlling question of law upon which there is substantial ground for difference of opinion". In the instant case the court below took Union's opposing affidavits as true. In **Kozak** it held that, absent sham or frivolity, the pleadings of the applicant for intervention should be taken as true. This court held similarly in **Sam Fox**. But in the instant case there was a hearing (R 126). That presents a different situation, and poses an important question which has not been, but should be, settled by this court. It is suggested that in such a situation, where the plaintiff in the main case opposes intervention by a would-be plaintiff, neither plaintiff's affidavits nor the would-be plaintiff's pleadings and affidavits should be taken as true, but that instead the outcome should be judged on the basis of the evidence adduced at the hearing.

6. On the question of the test to be applied respecting the requirement of Rule 24 (a)(2) that the applicant for intervention "is or may be bound" by a judgment in the main action, the decision of the court below is in demonstrable conflict with the decision of the U. S. Court of Appeals for the Second Circuit in **International Mortgage & Investment Corp. v Von Clemm (1962) 301 F 2d 857**, and the decision of the U. S. Court of Appeals for the District of Columbia in **Independent Refiners Ass'n. et al v Standard Oil Co. (N. J.) Case No. 16,725 (1962) 304 F 2d 387**. In each of those cases the court refused to

apply the res judicata test, and distinguished the decision of this court in **Sam Fox**.

In the instant case the court below (R-A 16, App. 12) refused to distinguish **Sam Fox**. Even though petitioner, as a stockholder of Union, is in privity with the plaintiff in the main case, and even though the District Court held (R 117) that common questions of law and of fact are involved, the court below held that petitioner had not sufficiently shown that he would be legally bound by a judgment in the main action, and (R-A 16, App. 12) that "The presence or possibility of difficulty, even great difficulty, is not enough". If a difficulty is great enough it amounts to impossibility, and that is just as prohibitory as res judicata.

7. On the question of the test that should be applied to the requirement of Rule 24 (a)(2) that the representation by existing parties of the interest of an applicant for intervention "is or may be inadequate", the decision of the court below is in demonstrable conflict with the decisions of other U. S. Courts of Appeal, in **International Mortgage** and **Independent Refiners**, supra.

If the facts show that the applicant, with good reason, is not on friendly terms with the attorney who in effect is representing his interest, which was held in **U. S. v C. M. Lane Lifeboat Co. (ED NY 1938) 25 F Supp 410, 411**, to be sufficient (and **Lifeboat** was followed by the court below in **Kozak**, l.c. 112, though distinguished in the instant case), and if they further show the aversive character and untoward quality of that attorney's representation of the interest of a stockholding applicant whose company, the plaintiff in the main action, is opposing his intervention as a party plaintiff, and that there is "sound reason for belief" that that company "may fail adequately to protect" the applicant's interest, since it has shown "a conspicuous disinterest in asserting the rights" of that

company, which was the test applied in **International Mortgage, l.c. 860, 861**, then it is believed that the test is met. Though petitioner showed it here, "it is not necessary to show that such parties or their counsel are not acting in good faith, or are not properly discharging their duties", as stated in **Independent Refiners, l.c. 393**. An attorney who serves the conflicting interests of a company and the industry of which it is a member cannot adequately represent the interest of a stockholder of that company who is seeking derivative intervention in a Clayton Act suit.

8. The decision of the court below so far departs from the usual course of judicial proceedings as to call for the exercise of this court's power of supervision. The court below not only entertained, but based its decision on, an incompetent transcript of a stockholders' meeting that was not shown as truly reciting what was said at that meeting, and that was objected to as hearsay. It did that even though that incompetent transcript was not filed in the District Court at or before the hearing, but after the hearing, and without leave as such. Mr. Woodbridge's second affidavit (R 103, App. 26), which incorporated recitals from that unsworn transcript, was not based on personal knowledge thereof as required by Rule 56 (e), and hence should have been treated as provided in Rule 56 (g).

9. There are special and important reasons for the review of this case on writ of certiorari. According to Feinberg, J., in **Atlantic City Electric Co. v General Electric Co. (SD NY, July 11, 1962) 207 F Supp 613, 614**, "roughly 1800" triple-damage Clayton Act suits that arose out of the February, 1961 convictions of certain members of the electrical equipment industry "are now pending". According to the **Co-ordinating Committee for Multiple Litigation of the United States District Courts** quite a number

of those cases, reported and unreported, raise important questions respecting class actions and intervention which not only have not been settled by this court, but which are new in the juridical sense. See Milton Handler, **"Some Unresolved Problems of Antitrust" (March 10, 1962) 62 CLR 930, 957.** In one of those recent intervention cases, **Philadelphia Electric Co. v Westinghouse Electric Corp. (CA 3, September 26, 1962) 308 F. 2d 856,** McLaughlin, J., dissented. In his dissent, **l.c. 861,** he referred to the "important issues of law and fact which are involved".

The instant case provides an opportunity for this court to settle many of those class intervention questions presently being raised in the District Courts. For example, the court below held (R-A 23, App. 19) that petitioner had to show a "positive" refusal on the part of Union to sue. That holding is believed to be plainly wrong. A showing of "positive" refusal is not required by Rule 23 (b). A corporation's non-compliance, for an unreasonable length of time, with a demand made by one of its stockholders that it sue for triple-damages under the Clayton Act would appear to satisfy the requirement of Rule 23 (b). As the court below, speaking through another panel, said in **Kansas City, Missouri v Federal Pacific Electric Co. (CA 8, November 6, 1962) 310 F 2d 271, 284,** when it amended the antitrust law Congress was "concerned with efficient enforcement of the Clayton Act".

Another example is shown by the statement in the opinion below (R-A 25, App. 21), quoting out of context a dicta of Mr. Justice Jackson of this court in a dissent, that "it is generally bad policy to encumber any case with unnecessary intervenors". Unnecessary or not, it is believed that Rule 24 (a) accords, as its heading states, "Intervention of Right", regardless of policy. As stated in **Philadelphia Electric Co.**, supra, l.c. 859, if its pre-

requisites are met "That rule confers upon an interested person an unqualified right to intervene". Or as stated by Hays, J., in his separate opinion in **International Mortgage**, supra, l.c. 865, Rule 24 (a)(2) requires that applications to intervene thereunder be granted whenever the judgment in the main case may permanently foreclose the applicant from assertion of his rights, "regardless of considerations of trial convenience, introduction of extraneous issues, confusion and delay". See also **Kozak**, supra, l.c. 108, where the court below, speaking through another panel, listed three, and only three, conditions for intervention under Rule 24 (a)(2).

10. This case cries out for review. We have antitrust laws because the American people have chosen competition as their economic way of life. **20 A.B.A. Antitrust Section, p. 29.** To assure competition those laws give subsidies to injured private parties who enforce them. **Id., p. 93.** Nonetheless, antitrust law violations are increasing. See **"The Great Price Conspiracy"**, supra. That is because there are men in the upper reaches of our large manufacturers who are motivated, not by a desire to compete effectively, but to climb their corporate ladders to the top. See petition for rehearing herein, p. 21. Union Electric Co., which itself stands charged by the National Rural Electric Cooperative Association with overcharging its customers more than $23,000,000 between 1956 and 1960, cannot condone its suppliers' overcharges. They are proscribed by law.

CONCLUSION

This petition should be granted.

Respectfully submitted,

J. RAYMOND DYER,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 922.

HARRY J. STADIN,
Petitioner,

vs.

UNION ELECTRIC COMPANY et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

Of Respondent Union Electric Company in Opposition.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement	4
Argument	12
I. The decision below is clearly correct and is based solely on the insufficiency of petitioner's pleading and the particular facts of the case	12
II. The decision below presents no important question of federal law and does not conflict with any other decision of this Court or the Courts of Appeal	14
Conclusion	16
Appendix—Opinion of Court of Appeals for the Eighth Circuit	17

CITATION OF AUTHORITY.

Cases:

Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936)	14
Billings Utility Co. v. Advisory Committee, 135 F. 2d 108 (8th Cir. 1943)	12, 14
Independent Refiners Ass'n et al. v. Standard Oil Company of New Jersey, 304 F. 2d 387 (C. A. D. C. 1962)	15, 16
International Mortgagee Investment Corp. v. Von Clemm, 301 F. 2d 857 (2d Cir. 1962)	15, 16

Marranzano v. Riggs National Bank of Washington, 184 F. 2d 349 (C. A. D. C. 1950) 12, 14

Pacific States Box & Basket Co. v. White, 296 U. S. 176 (1935) 12, 14

Rogers v. American Can Co., 305 F. 2d 297 (1962) 15

Sabin v. Home Owners' Loan Corp., 151 F. 2d 541 (10th Cir. 1945) 12, 14

Sam Fox Publishing Co. v. United States, 366 U. S. 683 (1961) 13, 14, 15

Stadin v. Union Electric Company, 309 F. 2d 912 (8th Cir. 1962) 10, 12, 13

Straus v. Foxworth, 231 U. S. 162 (1913) 14

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261 (1917) 14

Rules and Statutes:

Federal Rules of Civil Procedure, Rule 23 (b) 3, 13

Federal Rules of Civil Procedure, Rule 24 (a) (2) 2, 4, 5, 11, 13

Federal Rules of Civil Procedure, Rule 24 (b) (2) .. 4, 5

Sherman Act (15 U. S. C., § 1), Section 1 4

Textbooks:

4 Moore, Federal Practice, paragraph 24.08, pp. 38-39 12

4 Moore, Federal Practice, paragraph 24.14 ..... 12, 14

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 309 F. 2d 912 and is set out in full in Appendix A, *infra*. The order of the District Court is unreported and is set out in a separate appendix to the Petition for Writ of Certiorari at page 23.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 15, 1962 (Petitioner's separate appendix at page 22). A petition for rehearing was denied on December 26, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Under the facts of this case, is there any showing from the pleadings or otherwise that petitioner intervenor is or may be inadequately represented or that he is or may be bound by the judgment in the main action as required by Rule 24 (a) (2) of the Federal Rules of Civil Procedure?

2. Under the facts of this case, is there any showing from the pleadings or otherwise that petitioner intervenor has demanded that suit be filed and that Union Electric has refused to do so?

3. Under the facts of this case, is there any showing from the pleadings or otherwise that management of Union Electric has been guilty of a breach of trust or conflict of interest?

STATUTES AND RULES INVOLVED.

Rule 24 (a) (2) of the Federal Rules of Civil Procedure provides as follows:

> "Upon timely application any one shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Rule 23 (b) of the Federal Rules of Civil Procedure provides as follows:

"(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

STATEMENT.

Petitioner seeks review of the judgment of the Court of Appeals for the Eighth Circuit affirming the District Court's order denying petitioner's motion for leave to intervene in two antitrust cases pending in the District Court. That motion sought leave to intervene both as a matter of right under Rule 24 (a) (2) of the Federal Rules of Civil Procedure and as a matter of discretion under Rule 24 (b) (2). Petitioner now seeks review of only one of the two original cases and only on the question of intervention as a matter of right. There was no printed record in the Court of Appeals, the case having been heard on the original papers filed in the District Court.

On December 26, 1961, Union Electric Company (hereinafter referred to as Union Electric) filed Cause No. 61 C 407 in the United States District Court for the Eastern District of Missouri, Eastern Division, against Westinghouse Electric Corporation and General Electric Company for treble damages under the antitrust laws of the United States by reason of overcharges in the sale by the named defendants to Union Electric of two turbine generator units. The complaint alleges a conspiracy to fix the prices of turbine generator units in violation of Section 1 of the Sherman Act (15 U. S. C., § 1). The complaint further alleges that the same conspiracy was subject to civil and criminal actions brought by the United States of America against the named defendants and the named co-conspirators; that the defendants subsequently pleaded guilty in the criminal action and a judgment of conviction was entered thereon; and that the civil action is still pending in the United States District Court for the Eastern District of Pennsylvania (Paragraphs 8, 9 and 12 of the complaint). Union Electric alleges that it has been injured as a result of the named conspiracy in an amount

equal to the difference between the prices charged Union Electric for two turbine generator units and the price which Union Electric would have paid for said units if the price had been established by free and open competition and had not been controlled by the conspiracy (Paragraphs 14 and 15 of the complaint).

On February 20, 1962, petitioner, Harry J. Stadin, filed a motion for leave to intervene as a plaintiff in the case under Rule 24 (a) (2) and 24 (b) (2) of the Federal Rules of Civil Procedure. Attached to the motion for leave to intervene was a pleading, styled an "Intervenor's Complaint". Virtually identical motions for leave to intervene and intervenor's complaints were filed by petitioner in seven other antitrust cases filed by Union Electric in other categories of equipment and against various suppliers of electrical equipment.

The intervening complaint contains the following allegations: Petitioner is the owner of 43 shares of 11,402,622 shares of Union Electric common stock outstanding. There are also 533,595 shares of voting preferred stock outstanding. On February 16, 1961, petitioner submitted to Union Electric's directors for their action and action by Union Electric's stockholders at their April 20, 1961, annual meeting the following proposal:

> "Resolved, That the Company take appropriate steps in pursuit of all its rights, including its right to triple damages under the Clayton Act, against any of those of its electrical equipment suppliers who were recently convicted of anti-trust law violations by U. S. District Judge J. Cullen Ganey, in Philadelphia, so as to achieve for the Company reimbursement of the difference between the illegal price it paid such suppliers for electrical equipment sold to it, and the fair market value of such equipment at the time it was bought."

The directors of Union Electric are alleged to have refused to include the proposal in proxy material they sent to Union Electric's stockholders, assigning as their reason for such refusal that the proposal was not a proper subject for action by stockholders under Missouri law (Paragraphs 1 and 2 of intervening complaint).

Petitioner goes on to allege in his intervening complaint that he submitted his resolution from the floor at the annual stockholders' meeting but members of the Board of Directors spoke out against the adoption of the proposal and it was defeated by a vote of 10,325,766 shares to 1,825 shares. Thereafter, petitioner advised the President of Union Electric that unless Union Electric undertook to pursue its legal rights against the price-fixers, petitioner himself would seek a legal remedy on its behalf. Subsequently, Union Electric did file antitrust suits for damages sustained by it by reason of conspiracies involving purchases of equipment in the following categories: (1) turbine generators; (2) meters; (3) power switchgear assemblies; (4) circuit breakers; (5) power transformers; (6) condensers; (7) instrument transformers; and (8) distribution transformers. Union Electric has not filed suit for damages allegedly sustained by it by reason of alleged purchases in the following categories of equipment: (1) power switching equipment; (2) low voltage power circuit breakers; (3) lightning arresters, cutouts and arrester-cutout combinations; (4) open fuse cutouts and accessories; (5) bushings and bushing accessories; (6) isolated phase buses and isolated phase bus structures; (7) Navy and marine switchgears; (8) network transformers; (9) low voltage distribution equipment; (10) power capacitors; and (11) insulators (See paragraphs 4, 5, 6 and 7 of the intervening complaints).

Petitioner further alleges that indictments were returned against the defendants named in the original suits regard-

ing the eleven categories of equipment not sued on; that defendants pleaded guilty to the indictments; and that Union Electric sustained substantial damages by reason of purchases by it of equipment in these categories. Petitioner also incorporates by reference in his intervening complaint the allegations made by Union Electric in its original turbine generator complaint (Paragraphs 6 and 8).

Petitioner states in his intervening complaint that by voting against his resolution as set out above, the directors of Union Electric thereby refused to bring suit for damages in the eleven categories of equipment named by petitioner and that the vote against his resolution was a condonation of the conspiratorial acts of defendants. It is further alleged that "such condonation and refusal on the part of Union's directors was not in good faith, amounted to an unreasonable, capricious and arbitrary exercise of business judgment and constituted a breach of trust on the part of said directors toward Union, toward intervenor, and toward the stockholders who voted with intervenor." The complaint also contains allegations that "representation by Union of intervenor's interest herein is or may be inadequate, and intervenor is or may be bound by a judgment in the main action herein"; that Union Electric's principal attorney in the main action is "not on friendly terms with intervenor"; and that "intervenor's claim and the main action herein have questions of law and fact in common" (Paragraphs 14 and 15 of the intervening complaints).

The intervening complaint concludes by asking judgment on behalf of Union Electric for three-fold the damages allegedly sustained by Union Electric by reason of its purchases in the eleven categories of equipment not sued upon by Union Electric. No relief is sought for damages sustained by Union Electric by reason of its purchases of turbine generators or by reason of its purchases

in any of the other categories of equipment for which Union Electric has filed suit.

Affidavits were filed both by petitioner and by Union Electric. Two affidavits signed by petitioner were submitted to the Court. Petitioner's first affidavit stated that after he offered his proposed resolution at the annual meeting of Union Electric's stockholders on April 20, 1961, some of the stockholders opposed the resolution and stated that the filing of suit would be a waste of money. The other affidavit stated that previously filed affidavits submitted by Union Electric contained hearsay evidence.

Union Electric submitted two affidavits by Mr. John A. Woodbridge, and one affidavit each by Mr. A. H. Schettler and Mr. Thomas L. Croft. Mr. Woodbridge, Vice President and General Counsel of Union Electric, stated in his first affidavit that he voted against Mr. Stadin's resolution because it was not a proper subject for action by stockholders since control of litigation and the decision whether or not to litigate is in the directors under Missouri law. He also pointed out that in regard to the question of including petitioner's proposal in the proxy statement, Union Electric was advised by the Securities and Exchange Commission that "it would not take any action if the management should omit the proposal from the proxy statement." He stated further that Union Electric has been studying for some time the purchases made by it of electrical equipment in order to determine whether it made any purchases of equipment in the various categories named in petitioner's intervening complaint and, if so, the extent of any overcharges for these purchases. Mr. Woodbridge's affidavit further stated that no final decision has been made as to any of the categories for which Union Electric has not filed suit except as to one in which Union Electric made no purchases during the indictment period. He further stated that Union Electric

has adopted a policy of filing separate suits in each category of equipment in order to avoid confusion, complexities of litigation and delays in an adjudication of the rights of Union Electric with regard to each category (Paragraphs 2, 3 and 5 of Mr. Woodbridge's first affidavit). Mr. Woodbridge's other affidavit contained complete and accurate excerpts from the transcript of the annual meeting of the stockholders held on April 20, 1961, relating to the question of the antitrust suits.

The affidavit of Mr. A. H. Schettler, Executive Vice President of Union Electric, stated that there are approximately 64,400 common shareholders and 7,000 preferred shareholders of Union Electric stock. Mr. Schettler further stated that all decisions by management with regard to the bringing of antitrust suits have been and will continue to be the result of the independent judgment on the part of management and that such decisions will be made only after an adequate investigation of the facts and that such investigation is still continuing (Paragraphs 2 and 3 of the affidavit of Mr. Schettler).

The affidavit filed by Mr. Thomas L. Croft, one of the attorneys for Union Electric, stated that intervention on the part of petitioner would unduly delay and prejudice the adjudication of the rights of Union Electric. Mr. Croft stated that if claims in other categories of equipment were added to each of the original suits filed by Union Electric, each case would become very complex because purchases in other categories involve literally thousands of items of equipment as well as purchases from many corporations besides those named as defendants in each case and that this would necessitate adding parties defendant to the original causes of action. Moreover, intervention would enlarge many times the number of interrogatories, depositions, pre-trial motions and briefs and arguments thereon and this would in turn delay the date of trial of each cause

It is further stated by Mr. Croft that, at trial, intervention by petitioner would cause the production of additional documents, testimony of many additional witnesses and petitioner would be the source of additional questions, objections and motions which would tend to confuse the proceeding. Intervention by petitioner would, according to Mr. Croft, cause collateral and extrinsic issues to be injected into the main causes of action in each case.

In addition to the affidavits filed, petitioner was permitted to testify at the hearing on his motion for leave to intervene, which was held on April 6, 1962. At that hearing Mr. Stadin testified that the recitals contained in his verified intervening complaints and in his affidavit filed with the Court on April 5, 1962, were true.

On May 17, 1962, the District Court entered an order overruling in all particulars the motion of petitioner for leave to intervene. The Court's order also stated that the ruling of the Court involved a controlling question of law and granted petitioner permission to make application for appeal under the expediting provisions of Section 1292 (b) of 28 U. S. C., relating to non-final orders. Such an application was made by petitioner and was denied by the Court of Appeals on June 11, 1962, without prejudice to any rights which petitioner might otherwise have. **Harry J. Stadin v. Union Electric Co.**, Misc. No. 163, September Term, 1961, Eighth Circuit. Thereafter, petitioner perfected his right to appeal under the ordinary procedures applicable to final orders.

On appeal, the Court of Appeals affirmed the District Court's order insofar as it pertained to intervention as a matter of right and dismissed petitioner's appeal insofar as it related to permissive intervention. The Court held that under the well-pleaded facts contained in the intervening complaint and also on the basis of other undis-

puted facts contained in the affidavits submitted by petitioner and by Union Electric, there was no showing, as required by Rule 24 (a) (2), either that petitioner was or might be inadequately represented or that he was or might be bound by the judgment in the main action. The Court also held that, under the facts, petitioner had failed to show a demand by petitioner that suit be filed and a refusal by Union Electric, or that there was any breach of trust by Union Electric and that both are required before a derivative action can be brought.

ARGUMENT.

I.

The Decision Below Is Clearly Correct and Is Based Solely on the Inadequacy of Petitioner's Pleading and the Particular Facts of the Case.

The decision below is clearly correct and is based primarily on several separate and distinct insufficiencies in petitioner's intervening complaint. First, petitioner failed to allege any facts showing inadequacy of representation. More than that, his complaint bespeaks *adequacy* of representation since it does not seek any relief in the cause of action in which intervention is sought. Petitioner seeks relief and damages only in eleven other controversies for which suit has not yet been filed by Union Electric. Rule 24 of the Federal Rules plainly contemplates that the inadequacy of representation be in the case in which intervention is sought, not in one or more other cases which the intervenor thinks should be filed. Moreover, as the Court below pointed out, petitioner's pleading does not embrace any charges of collusion, adverse interest or nonfeasance as required by Rule 24. **Stadin v. Union Electric Co.**, 309 F. 2d 912, 919 (8th Cir., 1962), and cases there cited; see also 4 **Moore's Federal Practice**, Section 24.08, pages 38-39. Petitioner's allegation that one of the counsel of Union Electric is unfriendly to petitioner is patently insufficient, and the allegation in his complaint that his representation "is or may be inadequate" is a bare conclusion and insufficient as a matter of law. 4 **Moore's Federal Practice**, paragraph 24.14; **Pacific States Box & Basket Co. v. White**, 296 U. S. 176, 185 (1935); **Straus v. Foxworth**, 231 U. S. 162 (1913); **Billings Utility Co. v. Advisory Committee**, 135 F. 2d 108 (8th Cir., 1943); **Marranzano v. Riggs National Bank of Washington**, 184 F. 2d 349 (C. A. D. C., 1950); **Sabin v. Home Owners' Loan Corp.**, 151 F. 2d 541 (10th Cir., 1945).

Secondly, there has been no showing that petitioner would be bound by the judgment entered in the main action as required by Rule 24 (a) (2). **Sam Fox Publishing Co. v. United States**, 366 U. S. 683, 694 (1961). In fact, as pointed out by the Court of Appeals, petitioner does not even contend that he will be bound by the judgment; he contends only that a judgment in the main action will cause him "great difficulty" in prosecuting the other eleven separate and distinct cases which he seeks to add to the main suit. **Stadin v. Union Electric Co.**, 309 F. 2d 912, 918 (8th Cir., 1962). Under any criterion, the fact that petitioner may have great difficulty in another law suit if he is not permitted to intervene in the main case is not enough to meet the requirement of Rule 24 (a) (2) that he is or may be "bound" by a judgment entered in the main action.

Third, petitioner's intervening complaint is insufficient insofar as it attempts to comply with Rule 23 (b) pertaining to derivative actions. Contrary to Rule 23 (b), the complaint does not allege facts showing a demand on Union Electric that it file suit in the eleven categories of equipment which petitioner seeks to append to the main action. Rather, the only demand by petitioner was the resolution offered by petitioner that Union Electric take "appropriate steps" in pursuit of its legal rights; and it was after the defeat of this resolution that Union Electric did file eight lawsuits seeking treble damages from various electrical suppliers. Not only is it clear, as pointed out by the Court of Appeals (309 F. 2d at 921), that "appropriate steps" may not include the filing of a lawsuit and hence cannot be deemed a demand that Union Electric do so, but also even if the resolution can justifiably be called a demand, that demand was met when subsequent thereto Union Electric filed eight cases for violation of the antitrust laws.

Finally, even assuming for the sake of argument that there was a showing of demand and refusal, the intervening complaint is insufficient because it alleges no facts showing a breach of trust by the management of Union Electric in its decision not to sue, and the requirement of a breach of trust is clearly a condition precedent to the right to bring a derivative action. **United Coppers Securities Co. v. Amalgamated Copper Co.**, 244 U. S. 261, 264 (1917); **Ashwander v. Tennessee Valley Authority**, 297 U. S. 288, 319, 343 (1936); and see **Sam Fox Publishing Co. v. United States**, 366 U. S. 683, 689 (1961). There are no facts in the record in any way indicating a breach of trust. The best petitioner can do is make the unsupported allegation that there was such a breach. Such a conclusory allegation is clearly insufficient. 4 **Moore's Federal Practice**, paragraph 24.14; **Pacific States Box & Basket Co. v. White**, 296 U. S. 176, 185 (1935); **Straus v. Foxworth**, 231 U. S. 162 (1913); **Billings Utility Co. v. Advisory Committee**, 135 F. 2d 108 (8th Cir. 1943), **Marranzano v. Riggs National Bank of Washington**, 184 F. 2d 349 (C. A. D. C. 1950); **Sabin v. Home Owners' Loan Corp.**, 151 F. 2d 541 (10th Cir. 1945).

II.

The Decision Below Presents No Important Question of Federal Law and Does Not Conflict With Any Other Decisions of This Court or the Courts of Appeal.

There is no important federal issue involved in this case. The only question presented is the factual one of whether petitioner's intervening complaint is adequate to state grounds for intervention and for the bringing of a stockholder's derivative action. Such a factual type decision does not present any important question of federal law requiring review by this Court. A case of this kind must turn on its own precise facts and has little if any effect on any question of law. Petitioner is mistaken in

his contention that this case presents "an important sociological question" (Petition at page 4). On the contrary, the issues here are factual only; they are neither legal nor sociological.

Petitioner's assertion that the decision below is in conflict with the Third Circuit's decision in **Rogers v. American Can Company**, 305 F. 2d 297 (1962), is illusory. That case stands simply for the proposition that in a shareholder's derivative action for violation of the antitrust laws by the shareholder's corporation and others, there need be no showing of a breach of trust on the part of the management of the shareholder's corporation other than their participation in the illegal conspiracy. Here, Union Electric is not alleged to have been, and clearly was not, part of a conspiracy by the electrical suppliers. Absent participation, petitioner must allege a breach of trust in some other respect, but such an allegation is lacking in the intervening complaint. Thus the decision in **American Can** is not apposite here.

Petitioner's contention that the decision below conflicts with **International Mortgage & Investment Corp. v. Von Clemm**, 301 F. 2d 857 (2d Cir. 1962), and **Independent Refiners Assn et al. v. Standard Oil Company of New Jersey**, 304 F. 2d 387 (C. A. D. C. 1962), is equally without merit. The conflict allegedly consists in the fact that the courts in the above cases distinguished this Court's decision in **Sam Fox Publishing Co. v. United States**, 366 U. S. 683 (1961), on the facts, while the Court in the decision below followed **Sam Fox** and did not distinguish it; according to petitioner, a conflict was thereby created (Petition at pages 21-22). Manifestly, if the Courts in **Von Clemm** and **Standard Oil** should not have distinguished the **Sam Fox** case, it is those decisions, not the decision below, which should be reviewed by this Court. Moreover, the decisions in **Von Clemm** and **Standard Oil** are not in point and turn

upon their own facts. In **Von Clemm** the question of intervention turned, to a large extent, upon an interpretation of the Trading with the Enemy Act, and the **Standard Oil** decision involved the question whether certain oil refining companies could intervene in an action contesting the validity of an oil import regulation promulgated by the Secretary of the Interior. A reading of both decisions shows that they turned on their own facts, as did the decision below. The short of the matter is that the Court below found that petitioner's intervening complaint was factually insufficient for a number of reasons; that holding does not conflict with the decision of any other court.

CONCLUSION.

The decision below is clearly correct and involves merely a question of the factual sufficiency of a pleading. It involves no federal question of importance and does not conflict with any decisions by this Court or by the Courts of Appeal. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX A.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 17,104

Harry J. Stadin, Appellant,

v.

Union Electric Company, et al, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 15, 1962.]

Before SANBORN and BLACKMUN, Circuit Judges, and REGISTER, District Judge.

BLACKMUN, Circuit Judge.

This is an appeal arising out of the district court's denials of Harry J. Stadin's motions to intervene as a party plaintiff in two civil antitrust cases in which Union Electric Company is an original plaintiff.[1]

[1] The district court initially denied Stadin leave to intervene in the first of these cases by an order expressing the opinion required by 28 U.S.C. § 1292(b) as a condition of this court's discretionary allowance of an appeal from an order not otherwise appealable under that section. We denied Stadin permission to take that appeal but did so without prejudice to any rights he may otherwise have.

Thereafter the district court entered an order denying Stadin leave to intervene in the second case. By that same order, however, the court consolidated both cases for purposes of appeal and found that Stadin's claim was a shareholders' class claim for damages in addition to those sought by Union in the main actions and that the situation was thus one of multiple claims. It then made the express determination prescribed by Rule 54(b), F.R.Cv.P., as to no just reason for delay and entered judgment against Stadin. The appeal therefore is from the final decision in each case denying Stadin leave to intervene.

Union is a utility engaged in the business of generating and furnishing electricity. The defendants Westinghouse Electric Corporation, General Electric Company and Sangamo Electric Company are electrical equipment manufacturers. Stadin, the applicant for intervention, is a minority shareholder of Union.

The progenitors of these cases are judgments of conviction entered in February 1961 against these defendants and others in federal criminal antitrust proceedings in the United States District Court for the Eastern District of Pennsylvania. The offenses there charged, and to which the defendants pleaded either guilty or nolo contendere, had to do with conspiracy and price rigging in the sale of electrical equipment.

On December 26, 1961, Union instituted the first of the two present actions. It is brought under § 4 of the Clayton Act, 15 U.S.C. § 15, for a claimed violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and is against Westinghouse and General Electric. By it Union seeks threefold damages allegedly resulting from overcharges in the sales of turbine-generators to Union by the respective defendants. On January 31, 1962, Union and Missouri Power & Light Company and Missouri Edison Company, which also are utilities engaged in the business of generating and furnishing electricity, instituted the second action. This is brought under the same sections of the Clayton and Sherman Acts and is against Westinghouse, General Electric and Sangamo for threefold damages allegedly resulting from overcharges in sales by the respective defendants to the plaintiffs and their predecessors of watt-hour and rate-of-demand meters.

Stadin's motions to intervene followed in February and March. His motion in the second case is directed only to Union's count in that action. Stadin rests each motion on the grounds that Union's representation of his interest is or may be inadequate and that he is or may be bound by

a judgment in the action, within the meaning of Rule 24(a)(2),[2] F.R.Cv.P., having to do with intervention of right, and that his claims and Union's have questions of law and fact in common, within the meaning of Rule 24(b)(2),[3] having to do with permissive intervention.

As required by Rule 24(c), each of these motions is accompanied by a pleading. This is called an "Intervenor's Complaint". Each complaint incorporates by reference Union's own allegations. Each also contains certain allegations in common with Stadin's other complaint and additional allegations directed to the particular main action. The allegations are as follows:

a. Stadin owns 43 of Union's 11,402,622 common shares outstanding. There are also outstanding 533,595 voting preferred shares of Union.

b. In February 1961 Stadin submitted to Union's directors, for their action and for action by Union's shareholders at their annual meeting the following April, a proposed resolution[4] that Union "take appropriate steps"

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[2] Rule 24. "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *"

[3] Rule 24. "(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[4] "*Resolved*, that the Company take appropriate steps in pursuit of all its legal rights, including its right to triple damages under the Clayton Act, against any of those of its electrical equipment suppliers who were recently convicted of anti-trust law violations by U. S. District Judge J. Cullen Ganey, in Philadelphia, so as to achieve for the Company reimbursement of the difference between the illegal price it paid such suppliers for electrical equipment sold to it, and the fair market value of such equipment at the time it was bought."

against its electrical equipment suppliers who had been convicted in the federal criminal actions in Pennsylvania.

c. Union's directors refused to include this proposal among the proxy material sent to Union's shareholders for the annual meeting. The reason they assigned for this refusal was that the proposal was not a proper subject for action by the shareholders under Missouri law.

d. Stadin himself then submitted the proposed resolution at the April meeting. Members of Union's board of directors spoke out against it and they and management's proxy agents voted against it. The resolution was defeated by a share vote of 10,325,766 to 1,825.

e. Four days later Stadin advised Union's president that unless Union undertook to pursue its legal rights against the price-fixers Stadin himself would seek legal remedy, on behalf of the company and of those who voted with him, in a shareholders' derivative suit or suits.

f. Although Union, since December 1961, has filed Clayton Act suits against various defendants for damages sustained through price-fixing of electrical equipment in eight different categories, including the two involved in the main actions here, it has not yet brought suit for damages resulting from purchases of equipment in eleven other categories with respect to which the defendants were similarly indicted and convicted in the Pennsylvania federal court on pleas of guilty or nolo contendere.

It is then alleged that Union's directors, by opposing Stadin's resolution, voted against the bringing of suits against the defendants; that the later institution of suits for certain categories of equipment did not constitute a retraction of their refusal to bring suit for the other equipment categories; that the directors have condoned the sale to Union of this other equipment at rigged prices; that this was not in good faith and was a breach of trust; and

that John A. Woodbridge, "Union's principal attorney in the main action", inadequately represents Stadin because he is one of the directors who "voted against bringing the main action", is "not on friendly terms with" Stadin, stands charged by Stadin with having made illegal profits in the purchase and sale of Union's stock rights in 1959, and has characterized that charge as malicious. Each complaint asserts on information and belief that Union sustained damages "running into the millions of dollars" because of the fixing of prices of electrical equipment not covered by the main actions.

The complaints conclude with prayers for judgment in favor of Union and against the defendants in amounts equal to threefold the damages sustained by Union in the sales to it of equipment in the categories other than those which Union's pending actions concern.

Union opposed Stadin's intervention by memorandum and three supporting affidavits. The latter are executed, respectively, by Union's executive vice-president; by Woodbridge, who is its vice-president and general counsel; and by one of Union's independent attorneys. These affidavits contain, among other things, statements that Union has 64,400 common shareholders and 7,000 preferred shareholders; that Union has been investigating purchases made by it from the suppliers against whom antitrust suits were instituted by the United States; that the indictments of the defendants related to twenty categories of equipment; that purchases in the categories not yet sued upon "involve literally thousands of items • • • and purchases from many corporations besides those named as defendants"; and that after the investigation has been completed Union's management, with advice of counsel, will decide whether suit should be brought as to the remaining categories. Woodbridge's affidavit also states that Stadin's proposed resolution had been sub-

mitted initially to the Securities and Exchange Commission which advised that "it would not take any action if the management should omit the proposal from the proxy statement"; that he is not on unfriendly terms with Stadin; and that their relationship is so remote that he cannot be described as either friendly or unfriendly.

Stadin thereafter also filed an affidavit. In it he states that he is an attorney; that at the 1961 meeting two shareholders expressed opposition to his resolution because bringing suit would be wasting money; that Union's president then said that suits would cut into research and developmental programs of suppliers and would be detrimental to the industry of which Union was a member; that the shareholders were not advised that the resolution was not a proper one for shareholder action under Missouri law; that he was not on friendly terms with Woodbridge; that "My feeling about him, not his about me, is what counts"; that he is not satisfied with Woodbridge; that Woodbridge represents his own interests and the interests of management and does not represent the interests of Union's shareholders; that in his opinion it would be more efficient and more effective if Union filed its suits by defendants rather than by items of equipment; that intervention would result in no confusion, complexity or delay but denial of intervention would; and that if intervention is granted he would allocate his claims among the existing suits so that there would be no duplication of claims being sued upon.

Stadin also testified at the hearing on the motions to intervene. His testimony there was simply that the recitals in his complaint and affidavit were true. No cross-examination was undertaken and there was no further testimony.

A second affidavit from Woodbridge was then filed. This incorporated those parts of the transcript of the 1961

shareholders' meeting which included the comments of the two shareholders and the responsive remarks of Union's president. Stadin then filed another affidavit asserting that the statements made at the meeting were not under oath and were hearsay.

It is in this state of the record that the appeal comes to us.

Stadin's argument here, as we read his briefs, is that the conditions for his intervention as a matter of right under Rule 24(a)(2) have been met and the denial of intervention is reversible error; that the conditions for his permissive intervention under Rule 24(b)(2) have also been met and the denial of intervention is an abuse of discretion; that the recent case of *Rogers* v. *American Can Co.*, 3 Cir., 1962, 305 F.2d 297, is authority for the right of a minority shareholder, in the face of a contrary vote by the majority, to institute a shareholders' derivative suit for threefold damages under the Clayton Act; and that the *Rogers* case governs the present appeal.

One point must preliminarily be made. In *Kozak* v. *Wells*, 8 Cir., 1960, 278 F.2d 104, 109, this court said that, for purposes of judging the satisfaction of the conditions for intervention of right,

> "[W]e look to the pleadings, that is, to the motion for leave to intervene and to the proposed complaint or defense in intervention, and, absent sham and frivolity, we accept the allegations in those pleadings as true. * * * Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with ultimate results on the merits."

We cited, in support of this, *Otis Elevator Co.* v. *Standard Constr. Co.*, D.Minn., 1950, 10 F.R.D. 404, 406; *Kaufman* v. *Wolfson*, S.D. N.Y., 1956, 137 F.Supp. 479, 481;

Clark v. *Sandusky*, 7 Cir., 1953, 205 F.2d 915, 918; and *Dalva* v. *Bailey*, S.D. N.Y., 1957, 158 F.Supp. 204, 207.

Our quoted language, however, does not mean that, for the purposes described, all statements in pleadings of this kind are to be accepted as true irrespective of their nature or content. The situation is somewhat akin to that presented on a motion for summary judgment or on a motion to dismiss, namely, that only matters well pleaded (as the *Otis* and *Clark* opinions specifically state) are entitled to the preferential status of assumed truth. Conclusory statements are not. See 4 Moore's Federal Practice § 24.14; *Pacific States Box & Basket Co.* v. *White*, 1935, 296 U.S. 176, 185; *Straus* v. *Foxworth*, 1913, 231 U.S. 162, 168; *Dyer* v. *Gallagher*, 6 Cir., 1953, 203 F.2d 477, 479. Further, our language does not imply that the district court and this court may not consider allegations in pleadings and affidavits of the opponents to intervention to the extent that they, too, are well pleaded and supply uncontroverted and material facts. When so limited, this is not trial by affidavit. Stadin in effect acknowledges this by indulging in the filing of his own responsive affidavit.

We make the following observations:

a. What Stadin seeks is the institution of litigation in the eleven remaining categories of equipment. He would accomplish this by the addition, through intervention, of new causes of action in the two pending suits.[5] This is in contrast with the more common situation where intervention is sought on existing counts.

b. Stadin makes no attempt to intervene in the turbine-generator and meters categories as such. As to these he makes no request for additional relief and does not even

[5] See as to this, under Rule 24(b), *Kind* v. *Markham*, S.D. N.Y., 1945, 7 F.R.D. 265, 266; *Owen* v. *Paramount Productions*, S.D. Cal. 1941, 41 F. Supp. 557, 561.

reiterate the prayers which Union embodies in its complaints. Considering these two categories alone and isolatedly, Stadin thus makes no claim of inadequate representation or of possible binding effect of judgments and could be regarded as being satisfied with Union's representation there.

c. Stadin's claim of possible binding effect of judgments to be rendered in the turbine-generator and meters issues then comes down to nothing more than an argument that adverse judgments in these categories will have, by reason of their precedential status, a serious and untoward effect in the others.

d. Stadin's claim of inadequate representation comes down to assertions that Union, by not having instituted litigation in the remaining categories, is not even representing itself and thus is not representing Stadin at all; that absence of representation does not constitute adequate representation; that Woodbridge does not and cannot adequately represent Stadin; and that separation of suits by defendants rather than by equipment categories is more effective.

With these observations the insufficient character of Stadin's posture for intervention in these actions becomes apparent.

1. *Intervention of right—the effect of the judgment* That an applicant for intervention of right under Rule 24(a)(2) "is or may be bound by a judgment in the action" is an obvious prerequisite. This is apparent from the very language of the Rule. We have heretofore so held. *Kozak* v. *Wells*, supra, pp. 108-9 of 278 F.2d; *Pennington* v. *Missouri Pac. R. R.*, 8 Cir., 1956, 239 F.2d 332, 334.

Stadin's complaints in intervention reflect that the thirteen categories, that is, turbine-generators, meters, and the eleven not sued, concern different kinds of equipment.

The complaints assert, either directly or through their incorporation of the allegations of the main complaints, that each defendant pleaded guilty or nolo contendere, as the case may be, as to the respective categories. All this is a demonstration on the face of Stadin's pleadings alone that the issues are several in number and are varied as to factual background. This casts doubt on any claim that a judgment in one category will possibly operate with binding effect in another. But in his brief Stadin asserts, "If defendants successfully defended in the main cases appellant would have great difficulty in independently establishing their liability on his claims". This, as we have noted, is Stadin's basic argument on the effect-of-the-judgment feature.

We had occasion in *Kozak* v. *Wells*, supra, to consider the significance of the language in Rule 24(a)(2). We there concluded, pp. 110-11 of 278 F.2d, that we preferred to give the word "bound" a utilitarian and realistic interpretation and not a narrow one, that the words "may be" in the Rule indicate the judgment need not always operate as res judicata, that the Rule generally was to be given a liberal interpretation, and that "perhaps each case is to be decided and explained largely on its own facts". Cf. *International Mortgage & Investment Corp.* v. *Von Clemm*, 2 Cir., 1962, 301 F.2d 857, 861-62.

Liberality, however, does not equate with rights of indiscriminate intervention. The applicant must still meet the requirement that he "is or may be bound" by the judgments. The consequences of adverse judgments in the main actions are not nearly so evident here as they were in *Kozak* v. *Wells*, with the presence of factors (legal effectiveness of attacks against a state court order and judgment; existence and propriety of the defendants' acts) which we there specifically pointed out. Here there is only "great difficulty". The Supreme Court, in a case decided since *Kozak* v. *Wells*, has stated:

> "Second, appellants argue that even should they not be legally precluded from bringing a private action, nevertheless the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree. * * * [T]here is considerable weight to the argument that the court would feel constrained as a matter of comity at least to build on the foundations of the present decree. * * * However, it is abundantly clear that this effect is not at all the equivalent of being legally bound, which is what must be made out before a party may intervene as of right." *Sam Fox Publishing Co. v. United States*, 1961, 366 U.S. 683, 694.

The presence or possibility of difficulty, even great difficulty, is not enough.

2. *Intervention of right—adequacy of representation.* That representation of the intervention applicant's interest "by existing parties is or may be inadequate" is another obvious prerequisite for intervention of right under Rule 24(a)(2). This also is apparent from the very language of the Rule. Again, we have heretofore so held. *Kozak* v. *Wells*, supra, pp. 108-09 of 278 F.2d; *Pennington* v. *Missouri Pac. R. R.*, supra, p. 334 of 239 F.2d. If the representation "may be" inadequate, that itself is enough. *Ford Motor Co.* v. *Bisanz Bros.*, 8 Cir., 1957, 249 F.2d 22, 28.

The representation, the adequacy of which is to be determined here, is that of Union viz-a-viz the interest of Stadin as a shareholder of Union. Two leading commentators on federal practice have said that inadequacy of representation is or may be shown by proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in

the fulfillment of his duty. 4 Moore's Federal Practice § 24.08, pp. 38-39; 2 Barron & Holtzoff, Federal Practice and Procedure (Wright Revision), § 597, pp. 381-82. See also *Farmland Irrigation Co.* v. *Dopplmaier*, 9 Cir., 1955, 220 F.2d 247, 248-49; *Bisanz Bros.* v. *Chicago-Milwaukee-St. Paul & P. R. R.*, D. Minn., 1957, 20 F.R.D. 353, 354, vacated on other grounds, *Ford Motor Co.* v. *Bisanz Bros.*, supra, 249 F.2d 22; *S. C. Johnson & Son* v. *Boe*, E.D. Pa., 1960, 187 F.Supp. 517, 519; *Kind* v. *Markham*, supra, S.D. N.Y., 1945, 7 F.R.D. 265, 266.

The allegations in Stadin's pleadings embrace no charge of collusion; they speak of management's voting against the Stadin resolution and they charge that this bespeaks condonation and bad faith. These latter characterizations are only the pleader's conclusions. *Billings Utility Co.* v. *Advisory Committee, Board of Governors*, 8 Cir., 1943, 135 F.2d 108, 112; *Marranzano* v. *Riggs Nat'l. Bank*, D.C. Cir., 1950, 184 F.2d 349, 351.

Neither do we find anything of substance in Stadin's pleadings as to Union's having an adverse interest to that of Stadin. The claimed adversity centers in Woodbridge and in the allegations that he "is not on friendly terms with" Stadin; that he "voted against bringing the main action"; that he stands charged by Stadin before the S.E.C.; and that he called that charge malicious. These, however, do not equate with Union's having an interest adverse to Stadin. Furthermore, we fail to see the relevancy on this issue of the allegations as to the short swing profits, the charge of malice, and the lack of friendliness to Stadin. The allegation that Woodbridge voted against the main actions is an obvious over-interpretation of his vote against the Stadin resolution and, in any event, is largely disproved by Woodbridge's having signed the complaint as one of the attorneys for Union in each main action. Woodbridge is only one of several counsel for

Union. It is unrealistic and too much to demand that each lawyer for a corporation be on affirmatively friendly terms with each shareholder. We cannot escape the conclusion that Stadin's complaint as to inadequacy of representation lies largely in the area of asserted disagreement between lawyers as to how litigation should be conducted. Mere difference of opinion among attorneys is not of itself inadequate representation within the meaning of the Rule. If it were, intervention of right would become almost automatic.

Finally, we see no failure of Union as yet in the fulfillment of its duty. There is nothing along this line charged here with respect to the main claims. Nonfeasance, if it exists, is asserted as to the categories not sued upon. What we say below with respect to Union's refusal to act is equally pertinent here. Union must be given a reasonable opportunity to act before nonfeasance or neglect of duty within the concept of inadequate representation appears from the pleadings.

On the factor of unfriendliness of counsel our attention is called, with emphasis, to *United States* v. *C. M. Lane Lifeboat Co.*, E.D. N.Y., 1938, 25 F.Supp. 410. This was an action by the government to recover, from its supplier and the latter's performance bond surety, damages which the government had been compelled to pay for infringement of a patent embodied in the goods supplied. An officer of the supplier sought to intervene. He alleged that he and another officer, as a condition precedent to the surety's issuance of the bond, executed an indemnity agreement in favor of the surety. The petition to intervene disclosed that the supplier and the surety retained the same attorney and alleged that the intervener and that attorney were not on friendly terms. The court observed that any judgment rendered against the surety would enable it to proceed against the intervener in-

demnitor and that the judgment, though not directly binding the intervener, would do so indirectly. This is the heart and the significance of the case. The court did go on to observe, p. 411 of 25 F.Supp.,

> "Then too, there is something to be said as to the adequacy of the representation of his interest. He says that he is not on friendly terms with the attorney who in effect is representing his interest."

This, it seems to us, is no more than an embellishment upon the basic holding that it was the contingent liability of the intervener which warranted intervention.

We recognize that the *Lifeboat* case has been said to be authority for intervention based upon unfriendliness of counsel of record. See, for example, 2 Barron & Holtzoff, Federal Practice and Procedure (Wright Revision), § 597, p. 381, and *Farmland Irrigation Co.* v. *Dopplmaier*, supra, p. 249 of 220 F.2d. These are mere references, however, and we suspect they overstate the authority of the *Lifeboat* case.

We therefore conclude that there is not enough here to demonstrate either the possible binding effect of judgments in the main actions or the possible inadequacy of representation and that Stadin is not entitled to intervention of right.

3. *Permissive intervention.* Having reached this conclusion as to intervention of right we need not tarry long with the district court's denial of permissive intervention under Rule 24(b)(2). It has been indicated that an order denying permissive intervention is not appealable unless there is abuse of discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. R.*, 1947, 331 U.S. 519, 524-5. This court has commented upon this approach in *Pennington* v. *Missouri Pac. R.R.*, supra, p. 335 of 239 F. 2d, and particularly in *Ford Motor Co.* v. *Bisanz Bros.*,

supra, pp. 26-27 of 249 F.2d. In any event, the Rule itself directs that in the exercise of its discretion the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties".

It seems unquestionably clear to us from the pleadings of the intervener that his desired incorporation in the main actions of the several additional equipment categories will bring into these lawsuits added complexity; the inevitable problems attendant upon additional witnesses, interrogatories and depositions; expanded pretrial activity; greater length of trial; and elements of confusion. These in themselves suggest delay and the clouding of the issues involved in the original causes of action. More than one trial court has observed that "Additional parties always take additional time" and that "they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair". *Crosby Steam Gauge & Valve Co.* v. *Manning, Maxwell & Moore*, D. Mass., 1943, 51 F.Supp. 972, 973; *First Congressional Church, etc.* v. *Evangelical and Reformed Church*, S.D. N.Y., 1958, 21 F.R.D. 325, 327-8; *Wilson* v. *Illinois Central R.R.*, N.D. Ill., 1957, 21 F.R.D. 588, 589.

We cannot hold that the district court's denial of permissive intervention here was an abuse of the discretion possessed by the court under Rule 24(b)(2). Compare *Sutphen Estates* v. *United States*, 1951, 342 U.S. 19, 23.

4. *The derivative action aspects.* Stadin in his briefs has characterized his motions to intervene as class motions filed, under Rule 23(b), F.R.Cv.P., to enforce shareholders' secondary rights. We need not pass upon the narrow procedural question whether a derivative action may properly be instituted through the device of intervention. We assume for present purposes that it may. But, having

made that assumption, we fail to find upon this record that Stadin has met the conditions required for a federal derivative suit.

These conditions are several in number but Rule 23(b) itself clearly embraces four which are applicable to the situation here: (a) that the corporation possess rights which it may properly assert and enforce; (b) that the plaintiff shareholder make a demand upon the corporation to enforce those rights; (c) that the corporation refuses so to do; and (d) that the plaintiff's complaints set forth with particularity his efforts to secure corporate action and the reasons for his failure so to obtain such action or for not making such effort. See *Quirke* v. *St. Louis-San Francisco Ry.*, 8 Cir., 1960, 277 F.2d 705, 707-08, cert. den. 363 U.S. 845, and 13 Fletcher, *Private Corporations* (1961 Revision) §§ 5970, 6008. A fifth condition, which Stadin in his brief concedes still to be "the sine qua non of the stockholder's derivative right to sue", is that management be guilty of conduct equivalent to bad faith or breach of trust. *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 1917, 244 U.S. 261, 263-64; *Ashwander* v. *Tennessee Valley Authority*, 1936, 297 U.S. 288, 319, 343; *Hawes* v. *Oakland*, 1881, 104 U.S. 450, 460-61; *Heinz* v. *National Bank of Commerce*, 8 Cir., 1916, 237 F. 942, 948-49. Otherwise management possesses a wide discretion in determining a corporation's business policies and the methods of executing them. This discretion extends to litigation and to a decision to sue or not to sue. *Merrill* v. *Davis*, 1950, 359 Mo. 1191, 225 S.W.2d 763, 768. See *Swanson* v. *Traer*, 7 Cir., 1957, 249 F.2d 854, 858-9. It extends even to the settling of an antitrust claim. *Post* v. *Buck's Stove & Range Co.*, 8 Cir., 1912, 200 F. 918, 920. See *Sam Fox Publishing Co.* v. *United States*, supra, p. 689 of 366 U.S.

The demand Stadin made was that a resolution be adopted that Union take "appropriate steps in pursuit of

all its legal rights" against the convicted suppliers so as to achieve reimbursement for the price differentials. This was followed by a statement that if Union did not undertake to pursue those rights Stadin himself would seek a legal remedy. An outright demand to take "appropriate steps" is not necessarily equivalent to a demand that Union institute suit for the remaining categories. The term "appropriate steps" is broad and, although it is channeled here to Clayton Act threefold damages, it may well embrace steps which are short of actual suit. It may include investigation, the determination whether rights of action exist at all, negotiations, settlement and, under appropriate circumstances, even a decision not to sue. Furthermore, Union's refusal to comply with any demand to sue is not apparent. The shareholders did reject the resolution and to that extent refused to comply with the proposal from Stadin. But litigation was subsequently instituted as to eight categories. And we cannot conclude that the absence of litigation as to the remaining categories up to the time of the filing of the motions to intervene constitutes a positive and unwarranted refusal.

Finally, we find nothing in the pleadings which qualifies as a breach of trust or the like as required by *United Copper* and other cases cited above. Stadin's claims are (a) that the directors' opposition to his resolution was a vote against suing the defendants and (b) that the directors have condoned the sale of equipment in the other categories at rigged prices. We are not convinced that the directors' opposition to the resolution was a vote against suit. Time is necessary for the investigation, development and preparation of litigation. Suits in eight categories of equipment have already been instituted. The remaining categories are under investigation. This is not condonement or breach of trust.

Stadin presses upon us, however, the recent case of *Rogers* v. *American Can Co.*, supra, 3 Cir., 1962, 305 F.2d

297, where, despite a vote against the suit by a majority of a corporation's shareholders, it was held that a minority shareholder could maintain a Clayton Act treble damage action against the directors and the corporation's supplier. There, however, the plaintiff's charge was that his corporation was a captive through the conspiratorial activities of its controlling directors and a substantial shareholder and chief supplier. Under these circumstances, the court said, p. 317 of 305 F.2d:

> "The business judgment character of the stockholders' determination, generally effective to definitely terminate intracorporate controversies, must yield to the right of a minority stockholder to expose his charges of violations of positive law * * *."

Except in an extreme and unusual situation of that kind, we do not interpret *Rogers* as denying the authority of *United Copper* and its companion cases and, indeed, the language we have quoted so indicates. Neither do we regard the case as indicative of a new and nationwide public policy, as Stadin argues.

We find no comparable situation charged in the pleadings before us. There is no allegation that Union is in any way a captive or that its directors or management have engaged in conspiratorial activities with any of the convicted defendants. The remark of Union's president at the 1961 meeting to the general effect that treble damage suits could possibly weaken the whole group of suppliers so that it would affect adversely the industry's research hardly qualifies as a conspiratorial element. He named it as a worrisome fact and nothing more. The same is true as to the response of the president to the statements of the two shareholders. His remarks are only acknowledgments of the shareholders' comments and a statement of appreciation for them. They do not constitute, as Stadin would have us interpret them, expressions of interest "to

protect the price-fixers, and through them the 'industry', not Union's stockholders and consumers". What is charged here does not take these cases out of the general rule and into any area to which the *Rogers* case is conceivably applicable.

These Clayton Act cases which are arising out of the 1961 Philadelphia convictions will prove complicated enough in themselves. They will become much more complicated if shareholders are allowed to intervene upon showings of no more substance than is contained in Stadin's complaints here. As Mr. Justice Jackson said, dissenting in another context in *New Jersey* v. *New York*, 1953, 345 U.S. 369, 375, "it is generally bad policy to encumber any case with unnecessary intervenors".

Stadin, of course, presumably wants only that Union have adequate protection and representation and that it recover that which, if anything, is due from the suppliers and which may be obtained with a return, net, to the company. If this is fairly assured, intervention seems not to be warranted. On this record and at this time, we think there is fair assurance.

The district court's denials of the motions to intervene were not improper. So far as its order pertains to intervention under Rule 24(a)(2), it is affirmed. So far as it concerns intervention under Rule 24(b)(2), the appeal therefrom is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.